U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAR 13 2015 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director) and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director.

The petitioner is an engineering support business. It seeks to employ the beneficiary permanently in the United States as a piping engineering manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The director's decision concluded that the petitioner failed to establish that the beneficiary had five (5) years of progressive post-baccalaureate experience as required by the labor certification.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The Beneficiary's Qualifications

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The Immigrant Petition for Alien Worker (Form I-140) was filed on January 30, 2013. The priority date of the petition is July 30, 2012, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in mechanical engineering or related field.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months of experience.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months in engineering related field.
H.14. Specific skills or other requirements: None listed.

The record demonstrates that the beneficiary has earned a Bachelor of Science degree in mechanical engineering from the Philippines, completed in 1990, and that this education is equivalent to a Bachelor's degree in the United States.

The labor certification states that the beneficiary possesses the following experience: as a junior design engineer/draftsman for the Philippines, from January 20, 1992 to February 20, 1993; as a project engineer for the Philippines, from February 22, 1993 to April 2, 1996; operation officer (engineer) for the Philippines from April 22, 1996 to August 18, 2006; as a staff engineer with Texas from August 28, 2006 to August 31, 2007; and as a staff engineer for , Texas from September 1, 2007 to January 28, 2010.

Upon review of the entire record, including evidence submitted on appeal and in response to Notices of Intent to Dismiss and Notices of Derogatory Information (NOID/NDIs), the petitioner has established that it is more likely than not that the beneficiary possesses the minimum education and experience required for the proffered position as stated on the labor certification. Thus, the petitioner has overcome the ground for denial of the petition in the director's decision. Accordingly, the director's decision will be withdrawn.

Upon review of the record, we have determined, however, that the director did not fully consider whether the petitioner has the ability to pay the proffered wage and whether the petitioner has demonstrated that a successor-in-interest relationship exists with its new parent company. Therefore, we will remand the case to the director for further action.

The Petitioner's Ability to Pay and Successor-In-Interest

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[2] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Here, the ETA Form 9089 was accepted on July 30, 2012. The proffered wage as stated on the ETA Form 9089 is $121,472.00 per year.

The record indicates that the petitioner is structured as a as a C corporation. On the petition, the petitioner claimed to have been established in [redacted] to have a gross annual income of $902,602.00, and to currently employ 8 workers. On the ETA Form 9089, signed by the beneficiary on November 25, 2012, the beneficiary claimed to have worked for the petitioner since March 26, 2011.

In the instant case, the beneficiary's IRS Forms W-2 indicate that the petitioner paid the beneficiary $60,573.28 in 2012 and $76,175.41 in 2013. As such, the petitioner has established that it paid partial wages to the beneficiary in 2012 and 2013. According to USCIS records, the petitioner has filed two (2) other Form I-140 immigrant petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

In response to our November 13, 2014 NOID/NDI the petitioner provided its tax returns[3] and information regarding its other petitions, reflecting the following:

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[2] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

[3] For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18.

Tax Year	Net Income	Net Current Assets	W-2 Wage	Balance Due Beneficiary	Balance Due to Other Beneficiaries	Total Remaining Balance
2012	-$63,973.00	-$2,364.00	$60,573.28	$60,898.72	$92,934.00	$153,832.72
2013	-$36,834.00	-$38,964.00	$76,175.41	$45,296.59	$92,934.00	$138,230.59

As such, for the years 2012 and 2013, the petitioner did not have sufficient net income or net current assets to pay the difference between the actual wages paid and the proffered wages for all of its beneficiaries.

In response to our NOID/NDI, the petitioner explained that its United Kingdom parent company financially supports and covers the petitioner. The petitioner submitted 2012 and 2013 audited financial statements. The petitioner further advised that it had recently been acquired by and provided information regarding the new parent company's financial statements.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If is a different entity than the petitioner/labor certification employer and appellant, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).[4] Further, the petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). If the petitioner relies on the financial resources of its parent company, the parent company must also establish its ability to pay the proffered wages of all beneficiaries of all petitions filed by members of its group. The record does not include any information regarding other members of

In view of the foregoing, the director's decision will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.

[4] A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.